

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK WEDER RATHS,

Defendant-Appellant.

UNPUBLISHED

March 24, 2000

No. 211819

Monroe Circuit Court

LC No. 95-027058-FH

Before: Griffin, P.J., and Holbrook, Jr., and J. B. Sullivan*, JJ.

PER CURIAM.

I. Background Information and Procedural History

In lower court case number 95-027241-FC, defendant was charged with the following four counts involving his stepdaughter, “S.G.”: two counts of first-degree criminal sexual conduct (CSC) (sexual penetration of a person under thirteen years of age), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), one count of first-degree CSC (sexual penetration of a person at least thirteen, but less than sixteen, years of age, where the actor is a member of the same household as the victim), MCL 750.520b(1)(b)(i); MSA 28.788(2)(1)(b)(i), and one count of second-degree CSC (sexual contact with a person under thirteen years of age), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). In lower court case number 95-027058-FH, defendant was charged with the following two counts against his niece, “C.S.”: one count of third-degree CSC (sexual penetration where force or coercion is used, or where actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless), MCL 750.520d(1)(b) or (c); MSA 28.788(4)(1)(b) or (c), and one count of fourth-degree CSC (sexual conduct where force or coercion is used, or where actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless), MCL 750.520e(1)(b) or (c); MSA 28.788(5)(1)(b) or (c).

By stipulation of the parties, the two cases were consolidated for trial. Defendant was acquitted of all four counts of CSC against S.G., but was convicted of both counts of CSC against C.S.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defendant was sentenced to four to fifteen years' imprisonment for the third-degree CSC conviction and to sixteen months to two years in prison for the fourth-degree CSC conviction, the sentences to be served concurrently. He now appeals as of right, and we affirm.

II. Weight and Sufficiency of the Evidence

Defendant first argues that there was insufficient evidence to sustain his convictions, and because the jury's verdict was against the great weight of the evidence, the trial court erred in denying his motion for a new trial. We disagree.

A. Sufficiency of the Evidence

When reviewing a challenge to the sufficiency of the evidence, this Court must examine the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992); *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998).

Defendant was charged with third-degree CSC on a theory that he digitally penetrated C.S. A person is guilty of third-degree CSC if he engages in sexual penetration with another person and either force or coercion was used to accomplish the penetration, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), or the actor knew or had reason to know that the victim was mentally incapable, mentally incapacitated, or physically helpless, MCL 750.520d(1)(c); MSA 28.788(4)(1)(c). Any penetration or intrusion, no matter how slight, is sufficient to satisfy the "penetration" element of third-degree criminal sexual conduct. MCL 750.520d; MSA 28.788(4); MCL 750.520a(l); MSA 28.788(1)(l); *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

Defendant was additionally charged with fourth-degree CSC for touching C.S.'s breast. A person is guilty of fourth-degree CSC if he engages in sexual contact with another person, and either force or coercion was used to accomplish the contact, MCL 750.520e(1)(b); MSA 28.788(5)(1)(b), or the actor knew or had reason to know that the victim was mentally incapable, mentally incapacitated, or physically helpless, MCL 750.520e(1)(c); MSA 28.788(5)(1)(c). Sexual contact "includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(k); MSA 28.788(1)(k).

For purposes of both third-degree and fourth-degree CSC, "force or coercion" includes the following: actual application of physical force or violence; threatening to use force or violence, where the victim believes the actor has the present ability to execute those threats; threatening to retaliate in the future against the victim or any other person, where the victim believes the actor has the ability to execute this threat; engaging in medical treatment or examination of the victim in a manner or for purposes which are unethical or unacceptable; or overcoming the victim through concealment or by surprise. MCL 750.520d(1)(b); MSA 28.788(4)(1)(b); MCL 750.520e(1)(b); MSA

28.788(5)(1)(b); MCL 750.520b(1)(f)(i)-(v); MSA 28.788(2)(1)(f)(i)-(v). “Physically helpless” means that the victim was “unconscious, asleep, or for any other reason . . . physically unable to communicate unwillingness to an act.” MCL 750.520d(1)(c); MSA 28.788(4)(1)(c); MCL 750.520e(1)(c); MSA 28.788(5)(1)(c); MCL 750.520a(i); MSA 28.788(1)(i).

The prosecution presented sufficient evidence from which a rational trier of fact could find that the essential elements of the crimes of third-degree and fourth-degree CSC were proven beyond a reasonable doubt. *Wolfe, supra* at 515-516; *Marsack, supra* at 370. C.S. testified that during the early morning hours of August 15, 1995, she was sleeping on a couch in defendant’s sons’ room when she awoke to find defendant kneeling beside her with his finger in her vagina and “his weight . . . on my stomach, hurting me.” When she began to scream, defendant covered her mouth. C.S. testified that she threw her legs up in the air and almost escaped when defendant “got right back on top of me again” and began “sucking on my breast, giving me hickies.” Defendant then put her hand on his penis before she was finally able to get out from under him and run away.

From this testimony, if believed, the jury could have found each of the elements of third-degree CSC had been established: i.e., that defendant had digitally penetrated C.S. and either defendant used force or coercion (for instance, by overcoming her through the actual application of physical force, or through concealment or by the element of surprise), or he knew or had reason to know she was physically helpless (asleep). Additionally, the jury could reasonably have found from C.S.’s testimony that each of the elements of fourth-degree CSC had been established: defendant had made contact with C.S.’s breast for the purpose of sexual arousal or gratification, and either he had used force or coercion to accomplish this contact or he knew or had reason to know C.S. was physically helpless.

Moreover, C.S.’s testimony was corroborated by S.G., who testified at trial as follows: (1) C.S. slept upstairs in the boys’ room; (2) S.G. was awakened in the middle of the night when C.S. “came racing in my room, having a fit”; (3) C.S. told her that defendant had “put . . . his finger on her vagina and was rubbing her breasts, and made her touch his penis”; (4) S.G. saw a hickey on C.S.’s neck and breast; and (5) after S.G. was able to wake defendant’s wife, Carol, and tell her what had happened, Carol told defendant to leave the house.

C.S.’s testimony was additionally corroborated by Dr. Chapello, who stated she examined C.S. approximately twenty hours after the alleged assault. The examination revealed there was a hickey on C.S.’s neck and the nipple of C.S.’s left breast was inflamed, consistent with recent irritation such as sucking. Dr. Chapello’s examination also indicated that C.S.’s hymen was “mildly fimbriate,” consistent with her account of digital penetration, and there was an abrasion to the vaginal area. Further corroboration was supplied by several other witnesses who testified that on the night of the incident and the following day, C.S. was very upset and had hickies on her neck. Viewing the evidence in a light most favorable to the prosecution, the jury was clearly justified in finding that the essential elements of third-degree and fourth-degree CSC were proven beyond a reasonable doubt. *Wolfe, supra* at 515-516; *Marsack, supra* at 370.

B. Trial Court's Denial of Defendant's Motion for New Trial

The trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998). "An abuse of discretion will be found only where the trial court's denial of the motion was manifestly against the clear weight of the evidence." *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). When reviewing a trial court's decision regarding a motion for a new trial based on the great weight of the evidence, this Court may not attempt to resolve credibility questions anew. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998); *Daoust*, *supra* at 17.

Defendant's argument that the jury verdict was against the great weight of the evidence is based solely on his contention that C.S.'s testimony was unbelievable and was contradicted by various other witnesses. Michigan case law previously provided that the trial court could act as a "thirteenth juror" in deciding motions for a new trial. See *People v Herbert*, 444 Mich 466, 476-477; 511 NW2d 654 (1993); *Plummer*, *supra* at 306. However, our Supreme Court recently rejected this standard and held that a trial court may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998); see also *Gadomski*, *supra* at 28. Furthermore, the credibility of witnesses' testimony is a matter for the trier of fact to ascertain and will not be resolved anew on appeal. *Lemmon*, *supra* at 637; *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Although some witnesses contradicted C.S.'s version of the facts, "[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Lemmon*, *supra* at 647. Therefore,

[t]he question being one of credibility posed by diametrically opposed versions of the events in question, the trial court was obligated, "despite any misgivings or inclinations to disagree," to leave the test of credibility where statute, case law, common law, and the constitution repose it "in the trier of fact." [*Id.* at 646-647.]

The jury apparently believed C.S. and found that the prosecution had proven beyond a reasonable doubt each of the essential elements of third-degree and fourth-degree criminal sexual conduct. Because the jury's verdict did not result in a miscarriage of justice, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

III. Admission of MRE 404(b) Evidence

Next, defendant argues that the trial court abused its discretion in admitting evidence that defendant had physically abused Carol in S.G.'s presence. Defendant has waived this issue for appellate review by failing to provide this Court with the relevant transcript and written order of the trial court. Pursuant to MCR 7.210(B)(1)(a), defendant "is responsible for securing the filing" of the relevant transcript. "Normally, failure to provide this Court with the relevant transcript, as required by MCR 7.210(B)(1)(a), constitutes a waiver of the issue." *People v Anderson*, 209 Mich App 527,

535; 531 NW2d 780 (1995); see also *People v Wilson*, 196 Mich App 604, 615; 493 NW2d 471 (1992). Accordingly, we decline to review this waived issue.

IV. Trial Court's Failure to Sever the Charges for Trial

Defendant next contends that the trial court erred in failing to sever for trial the charges involving S.G. from those involving C.S. However, defendant stipulated to the consolidation of the two matters for trial and did not at any time move to sever the offenses. Accordingly, the trial court was never asked to exercise its discretion with respect to the consolidation or severance of the charges. Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence, *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999); *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997), and a party may not request a certain action of the trial court or stipulate to a matter and then argue on appeal that the action was error, *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Moreover, defendant has failed to demonstrate that he was prejudiced by the court's failure to sever the two cases; that is, that the alleged error affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

V. Sentencing

Finally, defendant claims that he is entitled to be resentenced because the trial court did not specifically ask him on the record whether he had had the opportunity to read and discuss the presentence investigation report; because the trial court failed to ask this question, defendant maintains, he was denied the opportunity to draw to the court's attention several inaccuracies contained in the report.

MCR 6.425(D)(2) provides, in relevant part:

. . . At sentencing the court, complying on the record, must:

(a) determine that the defendant, the defendant's lawyer, and the prosecutor have had an opportunity to read and discuss the presentence report, [and]

(b) give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges . . .

Subrule (D)(2)(a) is consistent with MCL 771.14(5); MSA 28.1144(5), which provides that "[t]he court shall permit the prosecutor, the defendant's attorney, and the defendant to review the presentence investigation report before sentencing."

MCR 6.429(C) provides, in relevant part:

A party may not raise on appeal an issue challenging the accuracy of the presentence report or the scoring of the sentencing guidelines unless the party has raised

the issue at or before sentencing or demonstrates that the challenge was brought as soon as the inaccuracy could reasonably have been discovered

Accordingly, because defendant did not raise below his claim that the presentence report contained inaccuracies, he may not now raise this issue on appeal. *People v Winters*, 225 Mich App 718, 730; 571 NW2d 764 (1997); *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996). However, defendant argues that this preservation rule should not defeat a challenge to the accuracy of the presentence report raised for the first time on appeal when the trial court has failed to comply with MCR 6.425(D)(2)(a).

Defendant's argument that the trial court erred in failing to specifically ask the parties on the record whether they had reviewed the presentence report is meritless. MCR 6.425(D)(2)(a) does not require the sentencing court to *ask* the parties whether they have had an opportunity to read and discuss the presentence report; rather, it requires the court to *determine* whether the parties have had this opportunity. It was perfectly clear from the discussion at the sentencing hearing that the parties had thoroughly read and considered the report, and that the court had implicitly made this "determination" as required by MCR 6.425(D)(2)(a). Moreover, defendant was given the opportunity to—and, in fact, did—challenge the contents of the report. Under these circumstances, even if it were conceded that the trial court failed to comply with MCR 6.425(D)(2)(a) when it did not explicitly ask the parties whether they had had an opportunity to read and discuss the presentence report, it cannot be said that this Court's failure to order resentencing would be "inconsistent with substantial justice." MCR 2.613(A).

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Joseph B. Sullivan